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No. 89-459

In the Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC., PETITIONER

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, after two air carriers merge, the National Mediation Board's exclusive jurisdiction over representation disputes bars arbitration of a union's claim for damages based on the alleged violation by one of the carriers of the successorship provision of its collective bargaining agreement.

2. Whether a union's request for arbitration of its damages claim for breach of a successorship provision in a collective bargaining agreement is rendered moot by the National Mediation Board's termination of the union's certification as representative.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Railway Labor Act (RLA or Act), 45 U.S.C. 151 *et seq.*, governs labor relations in the rail and air transportation industries. Under Section 2 Ninth of the Act, 45 U.S.C. 152 Ninth, the National Mediation Board (NMB) has the authority to investigate representation disputes and to certify bargaining representatives for a craft or class. The NMB's jurisdiction to resolve representation disputes is exclusive and is not subject to judicial review. *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943).

The RLA creates separate procedures for "minor" disputes—disputes over the interpretation or application of a collective bargaining agreement. See *Consolidated Rail*

Corp. v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989). The Act requires that such disputes be resolved through conferences and compulsory arbitration. 45 U.S.C. 152 Sixth. In the airline industry, these disputes are presented to system adjustment boards consisting of representatives of the union and the carrier. 45 U.S.C. 184. The NMB does not have power to adjudicate minor disputes. Its involvement is limited to appointing a neutral referee if a system board deadlocks, see *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 683 (1963), and interpreting the "meaning or the application" of agreements reached through mediation, if either party so requests. 45 U.S.C. 155 Second.[1]

2. Respondent Association of Flight Attendants (AFA) was the certified representative of the flight attendants on Western Airlines, Inc. As required by the Act, Western's 1984 collective bargaining agreement with AFA established a System Board of Adjustment to resolve grievances arising from the interpretation or application of the agreement. The agreement also included a "successorship" clause providing: "This agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until changed in accordance with the Railway Labor Act, as amended." Pet. App. 3a.

In September 1986, Western entered into a merger agreement with Delta Air Lines. Under the agreement, in December 1986, Delta was to acquire 100% control of Western, and in April 1987, Western was to be merged into Delta and to cease independent operations. Until the operational merger, Western would continue to honor its collective bargaining agreement with AFA. The mer-

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[1] A third category of RLA dispute (not at issue in this case) is a "major" dispute, which involves a conflict over a proposal to change rates of pay, rules, or working conditions. 45 U.S.C. 152 Seventh 156; *Pittsburgh & L. E. R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2589 n.4 (1989).

ger agreement did not purport to bind Delta to the Western-AFA collective bargaining agreement. Pet. App. 3a, 28-29a.

3. Before the merger's initial step, AFA filed a grievance against Western, alleging that Western had breached the successorship provision by failing to bind Delta to the collective bargaining agreement. When Western denied the grievance on grounds that it raised representation issues within the exclusive jurisdiction of the NMB, AFA submitted it to the System Board of Adjustment. Western failed to arbitrate.

After the first step of the merger took place, AFA filed a complaint in the United States District Court for the District of Columbia to compel arbitration. AFA requested expedited arbitration or, alternatively, the preservation of the status quo pending arbitration. As relief in the arbitration, AFA sought the restructuring of the merger so as to bind Delta to the existing collective bargaining agreement, or, in the event that Western failed to do so, the payment of damages. Pet. App. 3a-4a, 28a.

The district court dismissed AFA's complaint, holding that it raised a representation dispute within the exclusive jurisdiction of the NMB. Pet. App. 27a-33a. The court stated that when representational issues are intertwined with arguably independent "minor disputes," courts should not undertake to separate the two, thereby dividing jurisdiction between the NMB and a system board of adjustment. *Id.* at 31a.

4. a. In another action commenced prior to the consummation of the merger, two other Western unions sued Western in the United States District Court for the Central District of California to compel arbitration. Like AFA, these unions alleged that Western had breached the successorship clauses of their collective agreements. The unions requested injunctive relief against completion of the merger pending arbitration. The district court denied relief, but in March 1987 the Ninth Circuit issued an order compelling arbitration and enjoining the merger until the arbitration was completed or until the

airlines stipulated that the arbitration would bind the successor corporation. *IBTCWHA, Local Union No. 2707* v. *Western Air Lines, Inc.*, 813 F.2d 1359, 1364 (1987). At the carriers' request, Justice O'Connor stayed that order pending the filing and disposition of a petition for certiorari. *Western Airlines, Inc.* v. *International Bhd. of Teamsters*, 480 U.S. 1301 (1987) (O'Connor, J., in chambers).

b. Following the stay of the Ninth Circuit's order, the operational merger of Delta and Western took place. Delta requested the NMB to determine whether the certifications of Western's unions were extinguished as a result of the merger. To answer that question, the NMB applied the factors bearing on whether the merger had produced a single transportation system, as set forth in *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218 (1987).[2] On July 9, 1987, the NMB ruled that, the merger having eliminated Western as a separate operating entity, the certifications of the unions at Western were extinguished as of April 1, 1987. Pet. App. 60a-62a.

c. On October 5, 1987, following the NMB's decision, this Court granted the petition for a writ of certiorari in the Ninth Circuit case, vacated the judgment, and remanded for consideration of mootness. *Delta Air Lines, Inc.* v. *International Bhd. of Teamsters*, 484 U.S. 806 (1987). On remand, the Ninth Circuit dismissed the ac-

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[2] If a merger results in the integration of two carriers' operations into a single transportation system, the NMB will generally determine that the certification of a union representing the acquired carrier's employees (who have become a minority in the new entity) has been extinguished. (Alternatively, the NMB in its discretion may order an election.) The NMB applies a multi-factor test in making that determination, and it may reach different results for different crafts or classes of employees. See, *e.g.*, *Trans World Airlines/Ozark Airlines*, 14 N.M.B. at 237-240. In contrast, if a merger results in the carriers' retaining separate transportation systems despite common ownership or control, the NMB will not extinguish existing union certifications.

tion as moot, stating that "none of the relief sought in the original complaint is now available." *IBTCWHA, Local Union No. 2702* v. *Western Air Lines, Inc.*, 854 F.2d 1178, 1178 (1988).

5. In an opinion issued after these developments, the court of appeals in this case reversed the district court's dismissal of AFA's complaint. The court first held that AFA's damages claim was not moot because the breach-of-contract allegations—if proved—could support a damages award in arbitration. Pet. App. 7a.[3] Turning to Delta's jurisdictional arguments, the court held that arbitration of AFA's successorship claim was not precluded by the NMB's exclusive jurisdiction over "representation disputes." The court explained that, regardless of an arbitrator's decision on AFA's damages claim, the NMB would still enjoy the exclusive power to certify or decertify a representative of Delta's employees. The court therefore concluded that arbitration of AFA's damages claim would not undermine the exclusive jurisdiction of the NMB. *Id.* at 13a-18a.

The court also held that an arbitration remedy for damages was not precluded simply because the arbitration would involve what Delta characterized as a "representation issue." The court reasoned that to extend the NMB's authority to cover all "representation issues" would be inconsistent with the specific functions assigned to the NMB in the Railway Labor Act, and would conflict with the Act's goal of encouraging "conciliation, mediation, and arbitration" as the favored means of resolving labor disputes. Pet. App. 22a (quoting *General Committee of Adjustment* v. *M.-K.-T. R.R.*, 320 U.S. 323, 332 (1943)).

Finally, the court dismissed Delta's suggestion that if the NMB itself lacks power to provide a damages remedy in a case such as this, then no tribunal can do so and

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[3] The court noted that another D.C. Circuit panel had previously found AFA's claims seeking "continued representation" to be moot, but had directed further briefing on whether AFA's claims for damages were moot. Pet. App. 6a.

the union is left without a remedy. Pet. App. 22a-23a. The court found no public policy that justified rendering successorship provisions "unenforceable and of no effect." *Id.* at 22a.

DISCUSSION

Petitioner urges that the arbitration ordered by the court of appeals—involving AFA's damages claim for Western's alleged pre-merger breach of a successorship clause—infringes upon the exclusive jurisdiction of the NMB over representation disputes. We do not agree with that contention, nor do we believe it warrants this Court's review. The arbitration involved here would not interfere with the exclusive authority of the NMB over representation disputes. Rather, allowing the arbitration to go forward is fully compatible with the statutory plan to entrust representation disputes exclusively to the NMB and to entrust minor disputes over contract application exclusively to arbitrators.

Nor do we believe that this case conflicts with decisions of other courts of appeals. Several decisions have barred unions from pursuing contract claims for injunctive or declaratory relief on the ground that the resolution of those claims would effectively determine a representation dispute that is committed to the NMB. Neither the holdings nor rationales of those cases require the denial of arbitral jurisdiction to consider a claim for damages for a pre-merger breach of a successorship provision. While one very recent decision of the Second Circuit rejected a union's request, following an airline acquisition, to compel arbitration of a claim for contract damages, the facts of that case are significantly different from those presented here. Any tension in rationales between the two decisions does not warrant this Court's review at present. Finally, we do not believe that certiorari is required because of fears that the decision below will create a climate of uncertainty inhibiting airline mergers. Such concerns are speculative, and, in any event, are not rooted in policies deriving from the RLA.

While there is a technical conflict between the decision below and the result reached by the Ninth Circuit

on the second question presented (mootness), we do not perceive a need for this Court to review that issue. The decision below is consistent with well-established principles of mootness. Moreover, the Ninth Circuit did not discuss or explicitly decide the issue presented here, and may well have viewed the issue of damages as not resolved by its opinion. Thus, in our view, the petition for certiorari should be denied.

1. Petitioner's central claim (Pet. 8-14) is that because the RLA vests exclusive authority over representation disputes in the NMB, it precludes arbitration of a union's request for damages based on an alleged breach of the successorship provision in a collective bargaining agreement. Nothing in the scheme of the Railway Labor Act requires that result.

a. Neither the language nor the underlying policies of the RLA require the denial of arbitration here. 45 U.S.C. 152 Ninth governs "any dispute * * * among a carrier's employees as to who are the representatives of such employees," and sets forth procedural mechanisms for the NMB to use in investigating the dispute and in certifying the proper representative. Following such certification, the carrier shall 'treat with the representative so certified as the representative of the craft or class." *Ibid.* It is settled that the courts lack authority to intervene in such representation disputes, which are entrusted exclusively to the NMB. *Switchmen's Union* v. *National Mediation Bd., supra.*

The arbitration requested by AFA would not require an arbitrator (or a court) to perform any functions that the Act assigns exclusively to the NMB in 45 U.S.C. 152 Ninth. In particular, a system board of adjustment would not be called upon to determine which union (if any) is the representative of Delta's flight attendants. Nor would Delta be obliged to "treat with" any particular representative as a result of an arbitral award. As a result, the representation rights secured for employees by the RLA—the right "to organize and bargain collectively through representatives of their own choosing" and the

right of a "majority of any craft or class * * * to determine who shall be the representative of the craft or class" (45 U.S.C. 152 Fourth)—would not in any way be compromised by the arbitration sought by AFA.

A system board considering AFA's claim would only have to take actions fully appropriate to the board's function of resolving contract disputes. The board would have to consult the collective bargaining agreement, determine the meaning and application of the successorship provision, and consider any defenses raised. If the system board concluded that the agreement reflected Western's promise to structure any merger so as to preserve the independent identity of its operations, and thereby to bind Western's successor to the AFA collective bargaining agreement, damages may be available to remedy a breach of that promise. Such an award would simply compensate AFA for Western's violation of a contractual undertaking. It would not undermine the authority of the NMB to certify a representative based on events as they actually unfolded.[4]

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[4] Much of petitioner's argument that this case involves a representation dispute depends on its formulation of the issue that would be put to the arbitrator—whether "the successor clause of the AFA/Western contract entitled AFA to be recognized by Delta as the representative of former Western flight attendants" (Pet. 7). That formulation mischaracterizes AFA's claim. AFA does not claim entitlement to recognition by Delta. As AFA reads the successor clause, it "imposed upon Western conditions *precedent to* a merger, and dictated that Western could engage in only those types of corporate transactions where there was no legal or other impediment to the successor's assumption of the Agreement." Resp. C.A. Br. 12 (emphasis in original). There is no dispute that an airline merger can be arranged so as to permit a successor to assume a collective-bargaining agreement; indeed, the parties here arranged the first step of their merger transaction to accomplish such a result.

Of course, whether a court agrees with AFA's interpretation of the successor clause is not the issue. "Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's

Petitioner argues (Pet. 12-14) that since injunctive relief pending arbitration of AFA's claim would be unavailable in light of 45 U.S.C. 152 Ninth, a damages remedy must also be denied. There is no anomaly, however, in holding that a damages remedy is not barred, although an injunction might impermissibly intrude upon the NMB's functions. Cf. *W. R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 769 n.13 (1983) ("Compensatory damages may be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy."); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 507 (1983) ("We need not address the [specific performance] issue * * * since respondents seek only damages."). Indeed, such a distinction is basic to the law of contract remedies. See 3 Restatement (Second) of Contracts § 365, Comment a. (1981).

An injunction that continues or extends the application of a collective bargaining agreement, even to preserve the status quo, can effectively determine the core issue of representation in derogation of the NMB's exclusive authority. See, *e.g.*, *International Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983).[5] Precluding such an injunction protects the

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claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but * * * by the arbitrator." *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649-650 (1986).

[5] *Texas Int'l Airlines* explained how an injunction in aid of contract rights can infringe upon NMB's jurisdiction. There, after two airlines merged, a union that had been recognized by the smaller of the two carriers sued for a declaration that its collective bargaining agreement remained valid and for an injunction ordering the Company to comply with the agreement until another representative was certified. 717 F.2d at 158, 160. The court held that it had no jurisdiction to enforce the collective bargaining agreement, explaining that the union played an "indispensable role in administrating the

NMB's unique role under the RLA, a role designed to facilitate labor peace and to clarify representation rights. No similar rationale, however, applies to the arbitration of a grievance seeking only damages for a carrier's pre-merger breach of a successorship provision. Because such an arbitration does not interfere with the NMB's role in investigating and resolving representation disputes, the principles developed with respect to injunctive relief do not apply.

The conclusion that the NMB's authority over representation disputes is not threatened here is reinforced by considering the interplay with other dispute-resolution mechanisms created under the Railway Labor Act. Although the NMB alone certifies representatives, the Act does not call for the NMB to interpret or apply collective bargaining agreements. Indeed, the NMB is not even authorized to determine the arbitrability of minor disputes under the Act, as to do so "would seriously interfere with NMB's neutrality in labor-management relations." *Ozark Air Lines, Inc.* v. *NMB*, 797 F.2d 557, 564 (8th Cir. 1986). In minor disputes, resort to the system boards of adjustment is mandatory. *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. at 687-689. The arbitral process was intended to reduce tensions over contract-related grievances, which might otherwise escalate and cause interruption of the Nation's transportation services. *Ibid.*

Consistent with the allocation of contract disputes to the system boards of adjustment, the NMB refused to inject itself into Delta's processing of grievances from the former Western unions in this case. Pet. App. 61a. The

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agreement," and that "[c]ontinuation of the contract in force unavoidably constitutes a determination of employee representation." *Id.* at 161. The court thus believed that "[g]iven the [NMB's] undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.* at 164.

NMB has also formalized its recognition of the limitations on its jurisdiction under 45 U.S.C. 152 Ninth in its "Merger Procedures" for the airline and railroad industries.[6] In the procedures for airlines, the NMB identified the following express limitations on its authority over representation disputes: (1) "These procedures are not a bar to the effectuation of voluntary recognitions otherwise permissible under the Act"; (2) "[t]hese procedures shall not act to inhibit the processing of pending grievances otherwise permissible under the Act"; (3) "[t]hese procedures shall have no effect on the survival of existing collective bargaining agreements"; and (4) "[t]he Board recognizes that when a dispute involves the interpretation or application of an airline collective bargaining agreement, Section 204 of the Railway Labor Act, 45 U.S.C. § 184, provides that it be referred to an appropriate adjustment board for resolution through arbitration." *Merger Procedures, Subp. F—Effect of Procedures*, 14 N.M.B. at 394-395. See also 17 N.M.B. at 55-56 (parallel limitations applicable to rail carrier mergers). Those limitations reflect the RLA's division of authority between the NMB and the system boards. The allocation of responsibilities under *Merger Procedures* is entirely consistent with the court of appeals' holding in this case; both further the underlying goal of the Act to promote the peaceful settlement of labor disputes in the transportation industry.

Since the NMB clearly has no power to hear a claim that Western breached the successorship provision or to award damages, petitioner's argument, if accepted, would render that provision unenforceable in the pres-

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[6] See *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry (Merger Procedures)*, 14 N.M.B. 388 (1987); *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Railroad Industry*, 17 N.M.B. 44 (1989).

ent context. The invalidation of the provision of the AFA-Western contract, however, is not justified here. Although "a court may not enforce a collective-bargaining agreement that is contrary to public policy," the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W. R. Grace*, 461 U.S. at 766; *United Paperworkers Int'l Union* v. *Misco, Inc.*, 108 S. Ct. 364, 373-374 (1987). Applying those principles, the Court ruled in *W.R. Grace* that an arbitrator could hold a company liable in backpay for laying off employees in violation of a collective bargaining agreement, even though the layoffs were conducted under the mandate of a conciliation agreement that the company had entered with the Equal Employment Opportunity Commission. The Court explained: "The dilemma * * * was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations." 461 U.S. at 767. See also *Belknap, Inc.* v. *Hale*, *supra* (no preemption of state court damages action by employees who were laid off as a result of settlement of federal unfair labor practice complaint).

The same principles apply here. As in *Grace*, petitioner points to no source of law that justifies invalidating Western's contract. Its only argument is that the decision of a system board would somehow conflict with the NMB's exclusive authority to resolve representation disputes. As we have discussed, that is not so. Rather, under AFA's reading of the collective bargaining agreement, Western simply made two conflicting contractual commitments. Its agreement with AFA, the union contends, constituted a commitment to remain a separate carrier for representation purposes, while its merger agreement with Delta committed it to form a single transportation system. Although AFA cannot obtain specific performance of its contract by requiring Delta to "treat with" AFA as representative of the flight attend-

ants, AFA may seek damages for the breach. Cf. *W.R. Grace*, 461 U.S. at 768-769 & n.12.[7]

b. We do not agree with petitioner's contention (Pet. 15-22) that this case conflicts with decisions of other courts of appeals considering merger or acquisition-related issues under the RLA. Many cases, of course, have found particular contract claims barred by the exclusive jurisdiction of the NMB.[8] In those cases, however, a union sought to continue its representational

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[7] Of course, if an arbitrator were to enter an award that impermissibly strayed into areas reserved to the NMB under the RLA, such a decision would be voidable in post-award judicial review. We see no reason, however, to preclude the arbitral process at the outset because of some remote possibility that an award could be held improper.

[8] See, *e.g.*, *Independent Union of Flight Attendants (IUFA)* v. *Pan American World Airways, Inc.*, 664 F. Supp. 156 (S.D.N.Y. 1987), aff'd per curiam, 836 F.2d 130, 131 (2d Cir. 1988) (rejecting union's claim for arbitration of the question whether the collective-bargaining agreement covered jobs on a newly acquired, but separately operated, airline); *Air Line Employees Ass'n* v. *Republic Airlines, Inc.*, 798 F.2d 967, 968 (7th Cir.) (per curiam) (rejecting claim by a union that the court should declare invalid an agreement by the larger carrier in a planned merger to recognize rival unions as the representative of the post-merger workforce), cert. denied, 479 U.S. 962 (1986); *International Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (rejecting claim by a post-merger minority union for a "declaratory judgment that [the union's] collective bargaining agreement is still in force and will remain effective until another employee representative is certified"); *ALPA* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981) (rejecting claim by incumbent union for an injunction requiring carrier to use union pilots on newly formed subsidiary in accordance with collective bargaining agreement); *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975, 977-979 (1st Cir.) (rejecting claim that acquiring carrier was obligated to bargain with a union representing the acquired carrier's employees; but reserving question whether acquiring carrier had to arbitrate grievance), cert. denied, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks* v. *United Air Lines, Inc.*, 325 F.2d 576, 577 (6th Cir. 1963) (rejecting claim for a declaration that the acquiring carrier was bound by the collective-bargaining agreement between the union and the acquired firm), cert. dismissed, 379 U.S. 26 (1964).

status after a merger or acquisition, or to extend its certification to cover additional jobs, through the medium of an action purporting to enforce its collective-bargaining agreement. The courts in those cases found that the claims involved "representation disputes" because the collective-bargaining agreements could not be enforced without a determination of the unions' representative status. In that setting, the courts reasoned, a federal court decision would improperly resolve the very issue of current and future representation reserved to the NMB.

Since the present dispute involves a claim solely for damages for a pre-merger breach of the collective bargaining agreement, it does not require an arbitrator (or a court) to determine present representation rights. AFA is not seeking prospective application of its collective-bargaining agreement to Delta. Instead, AFA is seeking damages on the basis of Western's pre-merger decision to merge with Delta in a way that assertedly breached the successorship clause. Thus, the underlying rationale of the cases cited by petitioner does not apply here. Although the unions in some of the cited cases may have expressly or implicitly sought damages in addition to equitable relief, the heart of the claim in each instance was a request for prospective relief affecting ongoing labor relations. As a result, none of the appellate decisions cited by petitioner squarely considers or analyzes the implications of a request for damages alone.[9]

A recent decision of the Second Circuit did address a union's arbitration request for damages alone. In *Flight Engineers' Int'l Ass'n (FEIA)* v. *Pan American World*

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[9] Only *ALPA* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981), even mentions damages, indicating in passing that the complaint sought a judicial grant of "damages and injunctive relief," with an injunction and specific enforcement of the collective bargaining agreement being the primary objective of the suit. *Id.* at 17-18. The court's holding, however, was simply that *judicial* intervention was not warranted. *Id.* at 24. As the court below noted (Pet. App. 21a), given the limited role of the courts under the RLA, a judicial award of damages is plainly impermissible for contract claims. *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320 (1972). An arbitral award of damages stands on an entirely different footing.

Airways Inc., No. 89-7911 (Feb. 13, 1990), the court of appeals refused to order arbitration of a claim that an airline had breached a "scope" clause in a collective-bargaining agreement. The scope clause required the carrier or its subsidiaries to use union-represented employees for all of a designated type of work. FEIA asserted that the carrier had breached the clause by employing non-union personnel on a newly acquired regional airline. After the decision in *IUFA* v. *Pan American World Airways, Inc.*, *supra*, which held that a court lacks jurisdiction to compel arbitration of an analogous scope-clause claim seeking work reassignment, the union amended its grievance to seek only damages. The court of appeals found that FEIA's claim was nonetheless governed by *IUFA* because both cases "implicated representation concerns within the exclusive jurisdiction of the NMB, i.e., whether the union's certification applied to the subsequently acquired Ransome subsidiary and whether the two related airlines should be treated as a single carrier for representation purposes." *FEIA*, slip op. 5.

The rationale of the Second Circuit's holding in *FEIA* is in some tension with the present decision. It might be possible to recast the grievance in *FEIA* as a claim that the scope clause required Pan American to arrange any airline acquisition so as to permit FEIA to perform the work on the newly acquired carrier, and that Pan American had breached the clause by failing to do so when acquiring Ransome. So stated, the claim in *FEIA*, like the claim in this case, would flow from a single pre-merger act. Thus, under the theory accepted by the D.C. Circuit, such a reformulated claim by FEIA might have merit.

Nevertheless, the cases are significantly different on their facts. As the district court in *FEIA* pointed out, 716 F. Supp. 110, 115 (S.D.N.Y. 1989), the damages relief sought by the union in that case for breach of the scope clause would be triggered "*every time*" the acquiring carrier assigned work to an employee not represented by the union. Consequently, the Second Circuit

believed that "an award of the damages sought here—or even a realistic threat of such an award—would have the same practical effect" on representation rights as an injunction reassigning the work. Slip. op. 6. Here, in contrast, the basis of AFA's damages claim is that a single pre-merger action by Western—entering the merger agreement with Delta—constituted a breach of the successorship clause. A damages award for such a claim would not be equivalent to an injunction governing future representation rights. Moreover, the Second Circuit's approach in scope-clause cases appears to derive in part from a particular concern that arises in those cases. A union's claim that every assignment of work to non-union employees constitutes a breach of an ongoing collective agreement may well interfere with the independent interests of those employees in retaining their jobs and in choosing a representative.[10] Such a concern is not implicated, however, by a union's claim that a carrier is liable in damages, for breach of a successorship clause in an agreement no longer in force, because the carrier agreed to a merger that resulted in loss of the union's certification.[11]

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[10] The district court in *IUFA* (whose reasoning the Second Circuit endorsed in affirming, see 836 F.2d at 131) stressed that "the unrepresented flight attendants who worked Ransome's flights in the past and who now service the Pan Am Express flights have 'a representational stake' in the matters raised." *IUFA* v. *Pan American World Airways, Inc.*, 664 F. Supp. at 159. See also *FEIA*, slip op. 6-7.

[11] The Second Circuit itself distinguished the present decision by pointing out that the NMB had already extinguished AFA's certification by the time of the D.C. Circuit's decision; "thus, in view of the NMB's conclusive determination of the representation issue, a court order compelling arbitration of the damages claim would not interfere with the NMB's exclusive jurisdiction." *FEIA*, slip op. 8. While this is a factual distinction between the cases, we have some doubt of its significance, at least in the context of a claim under a successorship clause. Before the NMB decided the representation dispute in this case, AFA's damages might have been somewhat indefinite, but the claim itself had no potential to interfere with the NMB (whatever effect it might have on the parties' willingness

Because there is no direct conflict, any tension in rationales does not, in our view, warrant review by this Court. Nor does the decision below warrant review on the theory that it conflicts with Justice O'Connor's opinion granting a stay in *Western Airlines, Inc.* v. *International Bhd. of Teamsters*, 480 U.S. 1301 (1987). That opinion addressed only the question whether an injunction against the Delta-Western merger would impermissibly determine a representation dispute reserved to the NMB. This case, in contrast, raises the separate question whether AFA may obtain arbitral damages based on its claim that Western's merger agreement with Delta breached Western's successorship clause.

Given the paucity of decided cases dealing with claims solely for damages, we believe that further development of the law in the lower courts would be desirable. The rule governing claims for injunctive relief is well settled, and there is no reason to believe that the courts of appeals will diverge on damages claims like the present one. To be sure, cases like *FEIA* present harder questions, and the correct application of recognized principles in that context is as yet uncertain.[12] This Court would likely benefit from further ventilation of those questions in the lower courts.

c. Petitioner also asserts (Pet. 26-30) that this Court's review is necessary because of the possible uncertainties created by the prospect of damages in arbitration. We disagree. Although the risk of damages for breach of a successorship provision conceivably could influence the structure or viability of some airline mergers, more likely it would simply affect the price at which a transaction remains attractive. The union's claim for damages stands on the same footing as any claim against the acquired company: the post-merger entity generally

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to proceed). As we have noted, however, the two decisions are distinguishable on other grounds.

[12] In any event, a decision affirming in the present case, which we believe would be the correct result, would not necessarily explain the application of those principles to cases like *FEIA*.

inherits the acquired company's liabilities. Compare *John Wiley & Sons, Inc.* v. *Livington*, 376 U.S. 543, 550 n.3 (1964); *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 305 (1972) (Rehnquist, J., concurring in part and dissenting in part). And, to the extent that companies seek to arrange their transactions to accommodate existing collective bargaining rights, that choice is fully consistent with the policies expressed in the RLA.

What is more, the ultimate significance of the decision is uncertain. Petitioner may successfully contend in arbitration that the successorship clause was never intended to govern a comprehensive operational merger that destroyed the airline's independent existence. And even if liability for a breach is established, it is far from clear what the measure of damages would be. Finally, while we understand that successorship provisions may currently be common in airline labor contracts, management is free to bargain for more limited or precise provisions in future agreements.

At all events, even if some airline mergers are affected by the decision below, the policies of the Railway Labor Act do not provide a basis for changing that result. If Congress determines that the enforcement of successorship clauses adversely affects air or rail systems, it can provide a legislative remedy. Existing RLA provisions should not be stretched beyond their proper bounds to deny the claim asserted here.

2. The second question presented by the petition, regarding the asserted mootness of AFA's damages claim, also does not warrant review. Under well-established principles, a claim for money damages in a labor dispute is sufficient to prevail against a mootness argument, even when prospective relief is no longer available because the employer has left the business, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 459 (1957), or the union has been decertified, *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435, 441-442 (1984). In our view, therefore, the decision below is correct. Petitioner's arguments (Pet. 22-26) that this case is moot because no damages could

conceivably be awarded are largely a reformulation of the jurisdictional arguments discussed above.

Although we agree with petitioner that the decision below conflicts with the Ninth Circuit's disposition of the parallel litigation involving other Western unions in *IBTCWHA, Local Union No. 2702* v. *Western Air Lines, Inc., supra*, resolution of that technical conflict does not call for this Court's use of its limited certiorari resources. The unions' efforts in the Ninth Circuit litigation were concentrated on injunctive relief to preserve their continued representational status pending arbitration. As Justice O'Connor noted in her opinion granting a stay, the unions claimed in the Ninth Circuit that "completion of the merger would moot their claims under the collective bargaining agreement to System Board arbitration." *Western Airlines, Inc.*, 480 U.S. at 1309. And one of those unions (the Teamsters) also contended before the NMB that a decertification order would enable petitioner "to claim that the Teamsters' legal case has been rendered moot by intervening events." Pet. App. 54a-55a.

Although the unions later attempted to salvage their claims by recasting them to include the possibility of damages, the Ninth Circuit did not discuss the impact of a damages claim on mootness. Indeed, the court said only that "the relief sought was an order compelling the union to arbitrate and an injunction prohibiting the merger," and that since the merger had taken place "none of the relief sought in the original complaint is now available." Pet. App. 65a. The opinion also hinted that unspecified "post-merger" claims might require a different analysis. 854 F.2d at 1178. In view of the substantial uncertainty as to the meaning of the Ninth Circuit's per curiam disposition, and particularly in light of this Court's recent restatement of the basic principles governing mootness claims, see *Lewis* v. *Continental Bank Corp.*, No. 87-1955 (Mar. 5, 1990), the question of mootness does not merit this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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* The Solicitor General is disqualified in this case.

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